No. 83-4

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES BLAIR PORTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to inspect secret radar surveillance equipment used to track his airplane.

2. Whether petitioner had a legitimate expectation of privacy in an airplane hangar that was searched pursuant to a warrant issued by a municipal judge.

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OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. I) is reported at 701 F.2d 1158.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1983. A petition for rehearing was denied on May 3, 1983 (Pet. Supp. App. II). The petition for a writ of certiorari was filed on July 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner and two co-defendants, Gary Dennis Brickey and John Matthews, were convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 963. Peti-

tioner was sentenced to concurrent terms of five years' imprisonment on each count and fined $15,000.[1] The court of appeals affirmed (Pet. Supp. App. I).

1. The pertinent evidence, which is summarized in the opinion of the court of appeals showed that, during the night of January 26, 1981, Customs officers on airborne patrol in a Cessna jet sighted an aircraft flying at a low altitude and without lights over international waters off the coast of Florida. The sighting, which was made with the aid of a highly sophisticated air-to-air radar system and forward looking infrared radar (FLIR), enabled the officers to identify the suspicious aircraft as a low wing, twin engine plane. Pet. Supp. App. I(c).

Using this surveillance equipment, the Customs plane tracked the suspect aircraft into United States air space, at which time the plane climbed to a normal altitude and turned on its navigation lights. At this point, a second group of Customs officers flying in a Beechcraft plane made a visual sighting of the suspect plane and noted that its tail light was unusually bright. With the help of other Customs planes, the Customs Cessna jet followed the suspect aircraft northward over Florida and then westward over Georgia, Alabama, and Mississippi. The tracking of this plane was continuous except for one brief period over Alabama when de-icing equipment on the Cessna jet was utilized, causing the aircraft's power system momentarily to cut off the surveillance equipment. When the equipment was reactivated, it "locked onto" a target that the officers reasonably assumed was the suspect aircraft since the plane was continuing in the same northwesterly course at the same speed and altitude. Pet. Supp. App. I(c)-(d).

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[1] Co-defendant Brickey was sentenced to concurrent five-year terms and a $10,000 fine. Co-defendant Matthews was sentenced to concurrent terms of 50 months' imprisonment on each count and fined $12,000.

As it neared Holly Springs, Mississippi, the suspect aircraft gradually dropped off the radar screen as if it were making a landing approach. The Customs officers alerted the local police and two officers proceeded to the Holly Springs Airport, where they observed a twin engine plane taking off and heading in a westward direction. The plane apparently had been refueled from a pickup truck that was parked in an area of the airport that normally is locked and closed during night hours. The police searched the inside of the truck and found bolt cutters, suitcases, fuel tanks, aircraft radio equipment, flight logs, and manila folders labeled "N76DE."[2] A deputy sheriff searched the area and found that the lock at the airport entrance had been cut. Pet. Supp. App. I(d).

After the suspect aircraft left the Holly Springs area, the Memphis Area Control Center notified Customs that a possible target had been picked up headed toward Helena, Arkansas. The Beechcraft Customs plane, which was not equipped with special radar devices, was directed to this target and followed it to the West Helena Airport. The pilot made a visual identification of the suspect aircraft as a twin engine Piper Navajo, with a bright tail light similar to the one he had noticed on the plane that entered United States air space from off the coast of Florida. The Customs plane proceeded to land at the West Helena Airport behind the suspect aircraft and tried to block its departure. The aircraft managed to escape, however, narrowly avoiding a collision with the Customs plane. While the planes were on the ground, the Customs official was able to identify the pilot as petitioner and the plane's number as N76DE. Pet. Supp. App. I(e).

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[2] The decision of the court of appeals mistakenly states that the folders were labeled "N75DE" (Pet. Supp. App. I(d)). In fact, they were labeled N76DE, the number that corresponded with that on petitioner's plane (June 3, 1981 Tr. 542).

By the time petitioner's aircraft was airborne again, the specially equipped Customs Cessna plane had arrived and "locked" its radar onto the plane. Customs officers followed the aircraft until it landed again at Forrest City, Arkansas. With the aid of the FLIR system, Customs officers observed the aircraft come to a stop, after which two persons emerged for a short time, left an object near the runway, and returned to the plane, which immediately took off again. Shortly thereafter, local police found a 50 pound bundle of marijuana near the runway. Pet. Supp. App. I(e).

Petitioner's plane then proceeded to the airport at Arlington, Tennessee, where it landed. This time government planes prevented another departure, and petitioner and co-defendant Matthews were arrested nearby. A search of the plane revealed a small amount of marijuana debris in the passenger compartment, from which all the seats had been removed. Pet. Supp. App. I(f).

Later in the morning of January 27, police at the Holly Springs Airport conducted a more comprehensive search of the area around the pickup truck and found a piece of torn blue cloth on a barbed wire fence near the truck. A trail of down feathers led from the fence through a field for about a mile. Later that morning, a deputy sheriff arrested co-defendant Brickey at a nearby location; Brickey was wearing a torn blue down jacket. Pet. Supp. App. I(f).

2. On January 28, at the request of a DEA agent, a Helena, Arkansas, municipal judge issued a warrant authorizing the search of a locked hangar at the West Helena Airport.[3] There, law enforcement officers broke

[3] The search warrant affidavit outlined the pursuit of petitioner's aircraft from its interception off the Florida coast and the events that culminated in his arrest. These facts included the stop at the West Helena airport, where the plane appeared to head for the hangar; the stop at the Forrest City airport to

open a lock, entered the hangar, and discovered the missing airplane seats and additional marijuana residue. Petitioner moved to suppress this evidence. The evidence at the suppression hearing showed that the owner of the hangar had leased the Navajo airplane to petitioner and had told him that he could use the hangar occasionally if he needed to do so. However, the owner had never given petitioner any control over the hangar or the right to place a lock on it (May 4, 1981 Tr. 56-57). The district court denied petitioner's motion to suppress, and the evidence seized during the search of the hangar was admitted against petitioner at trial.

3. Prior to trial, petitioner also moved for leave to examine the radar equipment in the Customs Cessna aircraft that initially intercepted petitioner's aircraft. After government witnesses described at a pretrial hearing how the equipment was used to track petitioner's plane and explained the equipment's capabilities and operation, petitioner renewed his discovery motion, stating that he wished the witnesses "to show us how it operates in conformity with what has been said in the courtroom" (May 5 Tr. 163-167, 181-189; May 6 Tr. 608). When the prosecutor expressed his belief that the equipment was classified,[4] the district court directed him to obtain confirmation of this from the proper au-

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drop off a bale of marijuana; and the discovery of marijuana residue in the plane as well as the fact that its passenger seats had been removed for the apparent purpose of storing marijuana. The affidavit also stated that the agent's investigation revealed that the aircraft had been stored in a particular hangar at the West Helena airport, and that petitioner and his passenger "had been identified by eyewitnesses" as having been seen at the hangar. Finally, the affidavit expressed the agent's belief, "sustantiated by [his] conversations with personnel at the * * * [a]irport," that the missing seats and possibly marijuana residue would be found in the building. Affidavit for Search Warrant at Exh. A.

[4] A government witness had testified that the radar equipment in the Customs aircraft was the same as that used in the F-16 fighter plane (May 5 Tr. 181-182).

thorities (May 6 Tr. 609-612). Thereafter, the prosecutor advised the court that the Commissioner of Customs had informed him that components of the radar on the aircraft were classified as "secret" (May 29 Tr. 4).

The district court denied petitioner's discovery motion. It reasoned that the accuracy of the radar equipment was fully corroborated by independent evidence, and that the inability of the defense to acquire detailed knowledge of how the equipment operated did not materially impede its ability to cross-examine government witnesses. The court concluded that "the defendants' rights to a fair trial * * * are not seriously or materially affected in any respect by the lack of opportunity to * * * examine [or] investigate [the radar equipment]" (May 29 Tr. 13-14).

4. On appeal, petitioner argued, inter alia, that the district court's refusal to permit him to examine the classified radar equipment violated his rights to a fair trial and effectively to confront adverse witnesses, and that, as a result, dismissal of the indictment was required. He also urged that the search of the aircraft hangar violated his Fourth Amendment rights.

The court of appeals rejected these claims and affirmed the judgment of conviction (Pet. Supp. App. I). Addressing petitioner's discovery claim, the court held that the district court did not abuse its discretion in failing to dismiss the indictment and that petitioner's inability to inspect the surveillance equipment did not deprive him of a fair trial. The court observed that, at the suppression hearing, petitioner and his co-defendants extensively cross-examined the government witnesses who had been aboard the specially equipped Customs aircraft concerning the operation, range, and capabilities of the surveillance equipment, and that evidence resulting from the use of this equipment, which tended to identify petitioner's plane as the suspect aircraft that Customs officials had been tracking, was substantially corroborated by independent evidence (*id.* at I(h)-(i)). As to petitioner's suppression claim, the court

held that petitioner did not have a constitutionally cognizable privacy interest in the aircraft hangar and that, in any event, his arguments concerning the alleged insufficiency of the search warrant were without merit (*id.* at I(p)).

ARGUMENT

1. a. Petitioner contends (Pet. 24-38) that, in denying his motion for authorization to inspect the radar tracking equipment in the Customs aircraft, the district court failed to adhere to the procedures established by the Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 *et seq.*, codified at 18 U.S.C. App. at 549 *et seq.*[5] Because petitioner did not present this issue in the courts below, however, he is precluded from raising it for the first time in this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, although CIPA was not brought to the district court's attention during the pretrial hearings,[6] the court's actions in ruling on petitioner's discovery motion were not inconsistent with CIPA's provisions.

Petitioner argues (Pet. 29, 33) that, under Section 6(c)(2) of CIPA, before government information can be treated as classified, an affidavit must be submitted by the Attorney General attesting to its classified nature. That section of the Act, however, has nothing whatever to do with the government's threshold showing that material that is the subject of a discovery motion is classified. Instead, Section 6(c)(2) merely provides that where, following a hearing, a district court authorizes disclosure of specific classified material at trial and the government moves under Section 6(c)(1) of CIPA for

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[5] The Act is reproduced at Pet. 4-8.

[6] The Act had been in effect for approximately six months at the time the suppression hearing was conducted.

substitution of admissions of the relevant facts or unclassified summaries for the classified material, the Attorney General may support the motion with an affidavit "certifying that disclosure of classified information would cause identifiable damage to the national security of the United States * * *." The provision of the Act that arguably *is* relevant here is Section 1(a) of CIPA, which defines classified information as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security * * *." Petitioner has never challenged the accuracy of the Commissioner of Customs's assertion that components of the radar equipment used in the Customs aircraft had been classified as "secret."

Petitioner also errs in contending (Pet. 31-33) that, under CIPA, the district court was required to conduct its own in camera examination of the radar equipment on the Customs aircraft. Section (6)(a) of CIPA, upon which petitioner apparently relies to support this claim, does not require an in camera examination of classified material by the district court but merely permits the court to hold in camera hearings for the purpose of determining the use, relevance, or admissibility of such material when the Attorney General certifies that a public proceeding may result in disclosure of classified information.[7]

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[7] Petitioner's reliance (Pet. 31-32) upon *United States* v. *Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980), to support his claim that the district court should personally have inspected the aircraft radar equipment is misplaced. In that case, the court of appeals held that it was error for the district court to fail to inspect a CIA file to determine whether it contained exculpatory evidence to support the defense that money deposited into accounts over which the defendants had control was not obtained by fraud, as alleged by the government, but was obtained from the CIA to support anti-Castro activities. Although an in cam-

b. Petitioner also claims (Pet. 38-41) that denial of access to the classified radar equipment prevented his trial attorney from effectively cross-examining government witnesses and, therefore, resulted in denial of his right to effective assistance of counsel. As the court of appeals observed (Pet. Supp. App. I(j)), however, petitioner's counsel was permitted extensive cross-examination of the pilot and the surveillance equipment operator, who described in detail the characteristics, operation, capabilities, and limitations of both the air-to-air radar and the infrared system located on the Customs aircraft.[8] Nothing in the record suggests that the ability of petitioner's counsel to cross-examine these witnesses was inhibited in the least by the district court's refusal to permit him to examine the radar systems. Indeed, had he desired to challenge the tracking capabilities of the radar systems, petitioner could have done so by presenting an expert of his own who was familiar with the systems's operating capabilities. Petitioner, however, did not even attempt to pursue this course.

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era examination of such documentary materials would be virtually indispensible in determining whether it contained exculpatory material, it is unlikely that the district court's personal inspection of the radar equipment would measurably have enhanced the court's ability to rule on petitioner's discovery motion.

[8] During cross-examination at the suppression hearing, the radar operator described the basic working principles of the F-16 air-to-air radar system, as well as the range and identification capabilities of the FLIR infrared radar system, and he admitted that the latter system's ability to differentiate between particular aircraft or human beings was limited (May 5 Tr. 181-185, 188, 190, 199). At the hearing and again at trial the witness explained that the infrared system has the ability to "see in the dark" by picking up heat images through a camera-type sensor and displaying those images on a screen (May 5 Tr. 194; June 1 Tr. 165).

Finally, even if petitioner's inability to inspect the radar tracking equipment arguably hampered his cross-examination of the radar operator, it did not affect the fairness of the trial in the least. Although the equipment was employed to track the flight of an aircraft from international waters off the coast of Florida to two airports in Arkansas and to determine the plane's generic characteristics, the only evidence that specifically identified the aircraft and its pilot was the result of visual observations. The pilot of a Customs aircraft that was not equipped with the special surveillance systems testified that he visually sighted a suspicious aircraft in the vicinity of Vero Beach, Florida, observed that it had an unusually bright tail light, and followed it to the Holly Springs, Arkansas, airport where, after the aircraft nearly collided with his, he was able to read the plane's registration markings and observe the occupants, one of whom he identified as petitioner. After the plane took off, he continued to follow it to the airport at Forrest City, Arkansas, where he watched it land and where the observer in the specially equipped Customs aircraft saw the occupants deposit a package later identified as a 50 pound bundle of marijuana. When the plane again took off, he pursued it, landed behind it at the Arlington, Tennessee, airport, and arrested petitioner (May 5 Tr. 282-293; June 3 Tr. 568-585). That petitioner's aircraft was, in fact, the same aircraft that the Customs officials had followed and observed depositing marijuana at the Forrest City, Tennessee, airport was further corroborated by the presence of a pickup truck at the Holly Springs airport containing fuel, aircraft radio equipment, flight logs, and folders bearing the identification number of the plane; the discovery of scraps of co-defendant Brickey's jacket near the vehicle; and the discovery of marijuana debris in the aircraft (June 1 Tr. 68-77; Pet. Supp. App. I(j)-(k)). This evidence not only corroborated evidence

provided by the radar tracking equipment; as the district court observed, it overcame any possible contention that the surveillance devices were incapable of performing as the operator testified they had (Pet. Supp. App. I(k)-(l)).[9]

2. Petitioner contends (Pet. 42-61) that the district court should have suppressed the evidence seized during the warrant-authorized search of the aircraft hangar at the West Helena Airport. The court of appeals correctly concluded (Pet. Supp. App. I(p)), however, that petitioner lacked a legitimate expectation of privacy in the interior of the hangar and thus may not challenge the search of the hangar.

Petitioner contends (Pet. 44) that his privacy interest in the interior of the hangar was sufficient to support a Fourth Amendment claim because he was using the hangar with the owner's consent and, having placed a lock on its door, had a "subjective expectation of privacy" in its interior. But, as this Court explained in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), the proper standard for determining whether a defendant may maintain a Fourth Amendment claim is whether he possessed a "legitimate expectation of privacy in the invaded place," a standard that "means more than a subjective expectation of not being discovered" and is determined by reference to what "'society is prepared

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[9] *United States* v. *Kilgus*, 571 F.2d 508 (9th Cir. 1978), upon which petitioner relies (Pet. 26), is clearly distinguishable. In that case, the court reversed marijuana importing convictions where the only link between the defendants and the aircraft was provided by the operator of an FLIR radar system in a Customs aircraft. The court held that this constituted an insufficient basis for a conviction because the FLIR system is incapable of making particularized identifications. 571 F.2d at 510. In this case, by contrast, evidence linking petitioner and his aircraft to the importation of marijuana was furnished by visual identification and by circumstantial evidence that identified petitioner's aircraft as the suspect plane.

to recognize as reasonable.'" 439 U.S. at 143-144 n.12, quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980). Here, petitioner had simply been told by the hangar's owner that "he was welcome to use it occasionally, if he needed to use it." The owner never gave petitioner any control over the facility or permission to lock it, and petitioner knew that the owner, as well as others, had access to and stored property there (May 4 Tr. 57-58, 90-92; June 3 Tr. 504, 511, 517-518; Pet. Supp. App. I(p)). In these circumstances, the courts below properly concluded that petitioner lacked a legitimate expectation of privacy in the hangar. See, *e.g.*, *Rawlings* v. *Kentucky*, *supra*; *United States* v. *Glasgow*, 658 F.2d 1036, 1044 (5th Cir. 1981).[10]

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[10] In any event, there is no merit to petitioner's suppression claims. His argument (Pet. 48-51) that the search warrant was invalid because the municipal judge who issued it lacked jurisdiction to authorize searches outside the city limits of Helena, Arkansas, is frivolous. The law of the State of Arkansas authorizing issuance of search warrants by municipal judges does not limit their authority to do so on the basis of the territorial boundaries of the municipality. See Ark. Stat. Ann. § 43-205 (1977). Moreover, the reference in Fed. R. Crim. P. 41(a) to the authority of federal magistrates and state court judges to issue warrants "within the district wherein the property or person sought is located" obviously refers to the *federal* judicial district. Petitioner does not contend that the West Helena Airport is not in the same federal judicial district as Helena, Arkansas.

Similarly, petitioner's fact-bound challenge to the adequacy of the supporting affidavit is insubstantial and does not warrant review. Contrary to petitioner's assertions (Pet. 53-61), the agent's averment that the plane had been stored in the hangar was not based solely upon unverified hearsay statements, and there was a sufficient basis for his belief that the missing seats and possibly marijuana would be found there. The affidavit alleged that during its pursuit by Customs officers, the plane was observed landing at the West Helena Airport and taxiing in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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direction of the hangar. A day later, the affiant was told by disinterested eyewitnesses that the plane had been kept at the hangar. Thus, this is not a case, as petitioner maintains, where essential information in a search warrant affidavit is based upon the unsubstantiated assertions of anonymous tipsters.

Moreover, in determining whether there is probable cause to believe that evidence of a crime will be found in a particular place, a magistrate is entitled to draw reasonable inferences based on "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). See also, *e.g.*, *Anthony* v. *United States*, 667 F.2d 870, 874 (10th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Poland*, 659 F.2d 884, 897 (9th Cir.), cert. denied, 454 U.S. 1059 (1981). Here, the facts that the aircraft that had been used for drug smuggling was known to have been stored at the hangar and was headed toward it during the pursuit supported the reasonable inference, substantiated by information obtained from airport personnel, that the seats that had been removed from the plane to facilitate the operation, as well as marijuana debris from previous smuggling ventures, would be found there.